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In the Supreme Court of the United States

UNITED PHOSPHORUS, LTD., ET AL.,

PETITIONERS,

v.

ANGUS CHEMICAL COMPANY, ET AL.,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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ARGUMENT

Respondents' brief in opposition predictably argues that the legal issue decided by the court of appeals is narrow, uncontroversial, and irrelevant to the outcome of this case. A more accurate sense may be obtained by briefly perusing the thoughtful and wide-ranging opinions produced by the deeply divided *en banc* Seventh Circuit, every member of which understood that the issue is important, exceptionally difficult, and squarely presented.

The petition demonstrated that the Seventh Circuit's decision derives from a broader jurisprudence that frequently, if inconsistently, treats the substantive scope of the antitrust laws as a "jurisdictional" issue. It also explained that that entire jurisprudence is a colossal and crucially important mistake that only this Court can now correct. Respondents do not genuinely engage those realities. Instead, they spend the bulk of their opposition rearguing disputed facts in an attempt to manufacture an illusory vehicle problem, and trying in vain to establish that the FTAIA has nothing to do with the Sherman Act.

I. THE SEVENTH CIRCUIT'S DECISION MAY NOT BE DIVORCED FROM ITS CONTEXT AND REASONING

Respondents contend that the petition's discussion of this Court's Sherman Act cases is irrelevant because "the issue decided by the courts below related solely to the FTAIA, not to Section 1 of the Sherman Act." Brief in Opposition at 15. That observation entirely misses the point. Of course this is an FTAIA case. But it simply is not possible to understand the FTAIA, the Seventh Circuit's decision here, or the various other authorities cited by respondents without placing them in their appropriate statutory and jurisprudential context.

The petition explained that context in detail. Briefly: the idea that the commerce-nexus requirements of the Sherman Act somehow affect a court's "subject matter jurisdiction" originated in early 20th-century antitrust decisions. That idea was squarely rejected by this Court in *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291 (1923). Imprecise reasoning and loose "jurisdictional" language in various cases and commentary nonetheless continued after *Binderup*. And it is entirely unsurprising that this lax use of "jurisdictional" terminology ultimately infected the interpretation of the FTAIA. As this Court recognized in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 796 n.23 (1993), the FTAIA was simply designed to amend (or perhaps merely to codify) this Court's prior cases decided under those Section 1 commerce-nexus requirements. There is accordingly no way to interpret the FTAIA without considering that earlier jurisprudence.

And that is precisely how the courts of appeals, including the decision below, have approached this issue under the FTAIA. The Seventh Circuit majority essentially conceded in this case that its "jurisdictional" interpretation of the FTAIA would make little sense on a blank slate. *See* Pet. App. 12a-13a. That court nonetheless felt constrained to accept respondents' view, for reasons which ultimately trace back to the Section 1 jurisprudence that respondents now assert to be irrelevant. For example, the Seventh Circuit's conclusion was clearly driven in part by its belief that this Court adopted the "jurisdictional" interpretation in *Hartford Fire*. *See* Pet. App. 14a. But *Hartford Fire* was, of course, decided under Section 1 rather than the FTAIA—although this Court tellingly regarded the distinction as of little consequence. 509 U.S. at 796 n.23.

The Seventh Circuit also explicitly relied on its (erroneous) conclusion that the pre-FTAIA decisions of this Court and the courts of appeals consistently endorsed a

"jurisdictional" view of the extraterritoriality issue under Section 1. The court stated that the FTAIA "was enacted against a backdrop of almost 60 years of precedent which characterized the application of the Sherman Act to the conduct of foreign markets as a matter of subject matter jurisdiction," and that it "must presume that Congress expects statutes to be read to conform with Supreme Court precedent." Pet. App. 15a-16a. As the petition explained, the Seventh Circuit was actually led astray by loose dicta and "drive-by" jurisdictional rulings. This Court's only actual *holding* on these issues in fact decisively rejected the "jurisdictional" interpretation, *see Binderup*, 263 U.S. at 305-06, and the court of appeals decisions are deeply fractured, *see* Petition at 24-28. But even if it was understandably confused by the Section 1 cases, the Seventh Circuit obviously recognized that any proper understanding of the FTAIA must begin with those cases.

The administrative guidelines, scholarly commentary, and ambiguous legislative history so favored by respondents similarly do not suggest that the FTAIA broke with prior law. Indeed, taken as a whole the legislative history simply confirms this Court's conclusion from *Hartford Fire*—that the FTAIA was merely intended to codify the existing jurisprudence under Section 1. *See, e.g.*, *Empagran S.A. v. F. Hoffman-Laroche, Ltd.*, 315 F.3d 338, 345 (D.C. Cir. 2003) (confirming that FTAIA is a "'simple and straightforward clarification of existing American law'") (quoting H.R. Rep. No. 97-686, at 2 (1982)). Loose references to "jurisdiction" in these materials and other commentary simply express a common understanding derived directly from the Section 1 cases that respondents would now prefer to ignore. Respondents' insistence that the Section 1 history is irrelevant to the FTAIA is little more than willful blindness—a refusal to acknowledge the origins of the very authorities upon which they rely.

Respondents' suggestion (at 15-16) that "concerns unique to the extraterritorial context" make the Section 1 precedents irrelevant in an FTAIA case, and that "[t]he two provisions have completely different statutory language and different statutory contexts," are therefore inconsistent with *Hartford Fire*, with the Seventh Circuit's actual reasoning in this case, and with the authorities cited by respondents themselves. Perhaps respondents meant to say only that the Section 1 cases dealing with *domestic* commerce are irrelevant in this context; but the language of 15 U.S.C. § 1 does not draw or permit that distinction—and it certainly does not appear in the cases. *See* Pet. App. 8a-9a (discussing domestic commerce-nexus cases).

Respondents' assertion (at 15) that "[t]here is no Section 1 issue in this case for the Court to review" is also incorrect. This case was *brought* under Section 1. The FTAIA imposes additional requirements in certain Sherman Act cases, but it is not a separate cause of action. Petitioners must ultimately prove the commerce-nexus elements of Section 1 just like any other plaintiffs; the fact that the courts below have not yet been forced to address whether those requirements have been satisfied (or whether they are "jurisdictional") does not mean the issue is not present in this case, just as it was in *Hartford Fire*. In any event, the jurisprudential tangle described above guarantees that this Court will provide substantial assistance to the lower courts struggling with the parallel issue under Section 1, even if it technically confines its analysis to 15 U.S.C. § 6a.

II. RESPONDENTS' ARGUMENTS ON THE MERITS ARE UNPERSUASIVE

Judge Wood's thoughtful opinion for the four Seventh Circuit dissenters explains well why respondents cannot be right on the merits, but the brief in opposition makes a few new arguments that require a brief response.

First, the petition had pointed out that a jurisdictional

interpretation of the FTAIA would be flatly unconstitutional in criminal cases under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because the FTAIA affects the defendant's maximum exposure to criminal punishment. That counsels strongly against respondents' interpretation, since the same statutory language governs civil and criminal antitrust cases. Respondents reply that judicial resolution of the FTAIA issue "neither authorizes a sentence in *excess* of statutory limits nor takes the evaluation of guilt away from the jury," citing *Harris v. United States*, 536 U.S. 545, 549 (2002). Brief in Opposition at 24.

Respondents misunderstand both *Harris* and *Apprendi*. *Harris* holds that factual questions affecting only the defendant's *minimum* sentence may be decided by judges, so long as every fact necessary to authorize the statutory *maximum* is properly found by the jury beyond a reasonable doubt. But the effect on domestic commerce required by the FTAIA is one of the facts that must be proven before the Sherman Act authorizes any punishment at all; if that effect is not present, the U.S. criminal antitrust laws "shall not apply." Denying the defendant a right to jury trial and proof beyond a reasonable doubt on a fact that determines the line between criminal behavior and entirely lawful conduct is a core violation of *Apprendi*.

Respondents also argue that the "shall not apply" wording of 15 U.S.C. § 6a demands a jurisdiction-stripping interpretation as a matter of plain language. Yet it is hard to imagine a clearer way for Congress to say *the opposite*—i.e., that the statute simply does not cover the conduct in question—than "shall not apply." Respondents cite only one decision of this Court in support of their position, *see* Brief in Opposition at 18 n.8, and they misstate its holding.[1]

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[1] *New Jersey v. N.Y. Susquehanna & W. R.R.*, 372 U.S. 1, 7 n.5 (1963), actually stated that:

Finally, respondents also suggest that "sound judicial administration" favors a jurisdictional interpretation, because early dismissal of foreign-conduct antitrust cases will prevent "unnecessary and burdensome litigation in our courts." Brief in Opposition at 21. It is certainly a virtue of true jurisdictional issues (such as diversity or the well-pleaded complaint rule) that they can be disposed of quickly and efficiently. That is why this Court has repeatedly stated that "in most instances subject-matter jurisdiction will involve no arduous inquiry." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 587 (1999); *see also, e.g., Bell v. Hood*, 327 U.S. 678, 685 (1946) (subject matter jurisdiction exists whenever "the right of petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another").

But as the history of this case illustrates, placing a "jurisdictional" label on what is in fact a complex merits issue does not save time or judicial resources. This case was filed on April 4, 1994. Nine and a half years later, it is hard to see how a jurisdictional treatment of the FTAIA issue has helped to expedite the litigation.

In fact, complicated jurisdictional inquiries overlapping with the merits will more often *increase* delay and inefficiency, by preventing the court from disposing of the

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H.R. 12832 provided that: "this section [§ 13a] shall not apply to the operations of or services performed by any carrier by railroad on a single line of railroad located wholly within a single State." 104 Cong. Rec. 12547. *Also*, the House bill eliminated the Interstate Commerce Commission's jurisdiction over discontinuance of stations, depots and other facilities . . . .

(Emphasis added; alteration in original.) The word "also" shows that the language the Court quoted was not the language that "eliminated the Interstate Commerce Commission's jurisdiction over discontinuance of stations, depots and other facilities." Moreover, the scope of the ICC's "jurisdiction" is not subject-matter jurisdiction in the judicial sense.

case on an easier merits issue, or by requiring that the same issues be tried twice. *See* Pet. App. 25a-26a (Wood, J., dissenting). That is particularly true in this context, since the FTAIA does not merely overlap with the merits—it is completely coextensive with the merits. The FTAIA is not satisfied unless the conduct in question has the required effect on U.S. commerce *and* otherwise "gives rise to a claim" under the Sherman Act. 15 U.S.C. § 6a. A "jurisdictional" interpretation of that statute will therefore require judges to consider the full range of potential merits issues in foreign commerce antitrust cases under the guise of determining whether they have jurisdiction to entertain the case at all. *See* Pet. App. 36a (Wood, J., dissenting). That is not only inefficient but turns the entire concept of jurisdiction—power to decide the case either way—on its head. *See Bell*, 327 U.S. at 682 ("Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy.").

III. THERE IS NO OBSTACLE TO THIS COURT'S CONSIDERATION

Respondents argue at length that the district court either granted summary judgment in the alternative or would have if it had reached the issue. Even if true, respondents' argument would be irrelevant. This Court accepts review to decide important questions of law. It frequently grants certiorari in order to clarify the applicable legal standard, and then remands for application of that standard, without any concern for whether a particular litigant's case will ultimately stand or fall. The Seventh Circuit squarely decided the primary issue, while reserving decision on any potential alternative grounds. There is therefore no obstacle to this Court's consideration.

In any event, respondents' suggestion that the *en banc* Seventh Circuit intentionally wasted its own time is inconsistent with the record. The magistrate judge did not in fact grant summary judgment in the alternative. His opinion clearly states that he was granting the "motion to dismiss . . . for lack of subject matter jurisdiction," and that it was accordingly "unnecessary to consider the other motion argument(s) of [respondents]." Pet. App. 79a & n.11. That opinion also contains no discussion of the standards appropriate to a summary judgment decision. In context, the brief reference to summary judgment in the accompanying minute order is plainly a clerical error.

As the Seventh Circuit obviously recognized, the magistrate could not have granted summary judgment to respondents in any event. The opposition repeatedly quotes one sentence in the Seventh Circuit's opinion acknowledging that the court "need pass no judgment" on respondents' contention that they would have prevailed on either standard. Obviously that is correct, given how the Seventh Circuit decided the case. But the majority's opinion leaves no doubt that if it *had* been forced to confront the issue, it would have rejected respondents' argument. The court stated that "[t]he primary issue involves whether the relevant provision of FTAIA is jurisdictional or whether it states an additional element of a Sherman Act claim. This in turn affects how a court deals with it and, *in this case, what the outcome will be.*" Pet. App. 2a (emphasis added). "We think it is fair to say that in this case the procedure employed will dictate the result." *Id.* at 5a. And four judges dissented, indicating a belief that a different resolution of the "primary issue" would change the result on appeal.

The Seventh Circuit's apparently unanimous impression on this issue was correct. Even leaving aside respondents' one-sided discussion of the record relating to AB and 1-NP, there are clearly disputed issues of material fact relating to

petitioners' plans to manufacture Tris Amino and AMP. There is no basis, beyond respondents' say-so, for claiming that "tris amino and AMP . . . were at the periphery of the case in the district court." Brief in Opposition at 6. As the petition explained, when it served their purposes in the Cook County lawsuit, respondents insisted that petitioners planned to manufacture Tris Amino and AMP. The jury is entitled to treat that as an admission under Seventh Circuit caselaw. Petition at 5 (citing cases). And undisputed documentary evidence in the record showed that petitioners had concrete plans to manufacture those chemicals and always understood that the primary market for them was in the United States—where ANGUS itself sells almost $30 million per year. *Id.* at 5-6 (collecting record citations).

Respondents muster essentially two responses. First, they assert that even if petitioners did plan to make Tris Amino and AMP, they did not prove any intent to sell those chemicals *in the United States*. Brief in Opposition at 9 n.2. That is simply inconsistent with the record—which shows that the United States is the largest market for those chemicals, and that petitioners understood that the business opportunity was primarily in the U.S. market. Second, they claim that petitioners had undertaken no "research and development efforts" relating to Tris Amino or AMP, and had not yet identified U.S. buyers for those products. *Id.* at 8-9. But the record is full of evidence that petitioners' progress on those fronts was interrupted by respondents' anticompetitive actions—the filing and prosecution of the Cook County lawsuit[2] (including amending their complaint to seek punitive damages when petitioners tried to pursue

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[2] *See, e.g.*, R. 431/I Miller Dep. at 92-93, 191, 260, 271-73, 283-86, 302, 336-38, 362, 406-07, 549-50, 627, 644-45, Shroff Dep. at 136, 158-59, 445, 475, 550-51.

their plans while the lawsuit was pending),[3] and respondents' threats of further litigation, even after they had voluntarily dismissed the lawsuit, if petitioners persisted in their plans to enter the markets for nitroparaffins and nitroparaffin derivatives.[4]

IV. ALTERNATIVELY, THIS PETITION SHOULD BE HELD FOR *EMPAGRAN*

As respondents point out (at 20-21 n.9), the D.C. Circuit recently denied a petition for rehearing in *Empagran*, which addresses a separate FTAIA question about which there is a deep and acknowledged circuit split. *Empagran* will be an excellent candidate for certiorari, and the appellees have stated publicly that they intend to file a petition with this Court. *See* Lily Henning, *Antitrust Goes Global*, Legal Times, Oct. 13, 2003, at 22. That petition is due on December 10, 2003.

The threshold issue decided by the Seventh Circuit here is implicit in *Empagran*, but it was not briefed or argued in that case. Petitioners therefore respectfully suggest that it would aid this Court's consideration to hear both cases at the same time, and that if this Court is uncertain about whether to grant review in this case it should defer consideration of this petition pending a decision on certiorari in *Empagran*.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted or, in the alternative, held pending this Court's consideration of *Empagran*.

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[3] R. 431/X(A) Ex. H ¶¶ 40, 60, 65, p. 27 ¶ (c).

[4] R. 431/II at D022894; R. 431/I Miller Dep. at 666, Pals Dep. at 129, Shroff Dep. at 449, 477, 704-05, 718-19.

Respectfully submitted,

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